

NEWS

SECURITIES AND EXCHANGE COMMISSION

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"JUDICIAL DIALOGUES ON THE SECURITIES LAWS"

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* THE SECURITIES AND EXCHANGE COMMISSION, AS A MATTER OF POLICY, DISCLAIMS RESPONSIBILITY FOR SPEECHES BY ANY OF ITS COMMISSIONERS. THE VIEWS EXPRESSED HEREIN ARE THOSE OF THE SPEAKER AND DO NOT NECESSARILY REFLECT THE VIEWS OF THE COMMISSION.

MY SENSE OF PERSONAL IDENTITY HAS BEEN BOUND TO THE LAW FOR A LONG TIME. I WAS ONE OF THOSE IRRITATING AND INEXPLICABLE STUDENTS WHO LOVED LAW SCHOOL. WHEN I FIRST CAME TO WASHINGTON, I WAS FREQUENTLY ASKED WHAT IT WAS LIKE TO BE A COMMISSIONER. I SOMETIMES REPLIED THAT THE WORK WAS SO VOLUMINOUS AND SO CHALLENGING THAT IT WAS LIKE BEING BACK IN LAW SCHOOL. "IS IT THAT BAD?" A FRIEND ONCE ASKED. WITHOUT MUCH REFLECTION I REPLIED, "NO, IT IS THAT GOOD."

I HAVE WORKED AS A GOVERNMENT ATTORNEY, PROSECUTING SECURITIES FRAUD CASES; I HAVE WORKED AS A PRIVATE PRACTITIONER DEFENDING SUCH CASES, AND ALSO COUNSELLING CLIENTS ON CORPORATE AND SECURITIES MATTERS. I TAUGHT A LAW SCHOOL COURSE FOR A NUMBER OF YEARS, AND I HAVE BEEN INVOLVED IN BAR ASSOCIATION WORK AND LEGAL RESEARCH. I CAN HARDLY REMEMBER WHAT LIFE WAS LIKE BEFORE I BECAME A LAWYER AND BROODED ABOUT THE OBSCURITIES OF THE COMPLICATED LEGAL SYSTEM WHICH THIS COUNTRY ENJOYS AND SUFFERS.

MY POSITION AS A COMMISSIONER OF THE SEC IS THE FIRST PROFESSIONAL ROLE I HAVE UNDERTAKEN OUTSIDE OF THE PRACTICE OF LAW. NOW THAT I AM A CLIENT I MUST ADMIT THAT FOR THE FIRST TIME I UNDERSTAND SOME OF THE COMPLAINTS MY FORMER CLIENTS HAD AGAINST THEIR LAWYERS. NEVERTHELESS, I FIND IT HARD TO LOSE MY LAWYER'S PERSPECTIVE IN DOING MY WORK. AND I FIND CONTINUING TO READ THE LAW NECESSARY TO KEEP MENTALLY IN SHAPE.

SO WHEN JACK BOOKEY ASKED ME TO SPEAK TO THIS GROUP OF GOVERNMENT LAWYERS AND PRIVATE PRACTITIONERS I DECIDED TO SHARE WITH YOU SOME OF MY PERSONAL PERCEPTIONS ABOUT CURRENT TRENDS IN THE SECURITIES LAWS.

AS YOU KNOW, THE PRESENT SUPREME COURT HAS DEMONSTRATED A KEEN INTEREST IN SHAPING THE SECURITIES LAWS. SINCE 1975 THE COURT HAS ACCEPTED CERTIORARI IN A NUMBER OF SIGNIFICANT CASES IN ORDER TO EXPRESS ITS CRITICISM OF INTERPRETATIONS OF THE LOWER COURTS AND GIVE THOSE COURTS GUIDANCE. SINCE MANY OF THESE SUPREME COURT DECISIONS REVERSED CIRCUIT COURT OPINIONS, THE CIRCUITS AND THE DISTRICT COURTS HAVE HAD TO RESPOND TO THE SUPREME COURT AND REINTERPRET THE SECURITIES LAWS. I BELIEVE THAT THE SEC MUST LIKEWISE RESPOND TO THE SUPREME COURT.

ONE OF THE FIRST ETHICAL PRECEPTS I LEARNED AS A GOVERNMENT LAWYER IS THAT A PROSECUTOR'S DUTY IS NOT TO CONVICT BUT TO SEEK JUSTICE. IN ITS PROSECUTORIAL ROLE, THE SEC MUST ALSO SEEK JUSTICE, AND I BELIEVE THAT THE ENFORCEMENT DIVISION AND THE COMMISSION TRY TO DO SO. TO THE EXTENT THAT THE BURGER COURT HAS BEEN REDEFINING STANDARDS AND THEORIES OF LIABILITY UNDER THE FEDERAL SECURITIES LAWS, THE COMMISSION MUST BE RESPONSIVE TO THESE INTERPRETATIONS IN DECIDING WHAT KINDS OF CASES TO BRING AND WHAT KINDS OF ARGUMENTS TO MAKE IN THE COURTS. TO THE EXTENT THAT THE BURGER COURT HAS BEEN INTERPRETING THE SECURITIES LAWS MORE STRICTLY THAN PRIOR COURTS, AND HAS BEEN LIMITING ACCESS TO THE FEDERAL COURTS, THE SEC MUST CONSIDER THE IMPACT OF THE COURT'S DECISIONS ON INVESTOR PROTECTION.

I WILL TURN NOW TO WHAT MUST NECESSARILY BE A VERY GENERAL ANALYSIS OF THE DIALOGUES ON THE SECURITIES LAWS WHICH ARE IN PROGRESS BETWEEN THE SUPREME COURT, THE LOWER COURTS, AND THE COMMISSION. AS A LAWYER, I FIND THESE DIALOGUES FASCINATING. AS A COMMISSIONER, I BELIEVE THAT LISTENING TO WHAT THE COURTS ARE SAYING IS MANDATORY, BECAUSE GOVERNMENT OFFICIALS HAVE AN OBLIGATION TO RESPOND POSITIVELY TO WHAT THE FEDERAL COURTS SAY ABOUT THE LAW. I BELIEVE THAT WE MUST NOT ONLY REACT TO SPECIFIC CASES BUT THAT WE MUST CARRY OUT THE GENERAL POLICIES WHICH THE COURTS ARTICULATE.

THE THRUST OF DECISIONS BY THE U. S. SUPREME COURT WITHIN THE LAST THREE YEARS HAS BEEN TO LIMIT LIABILITY UNDER THE FEDERAL SECURITIES LAWS, SOMETIMES BY REFERRING PLAINTIFFS TO OTHER FORUMS. IN ADDITION, THE COURT HAS EMPHASIZED RECENTLY THAT SEC ADMINISTRATIVE PROCEDURES MUST SPECIFICALLY CONFORM TO STATUTORY REQUIREMENTS.

THIS ATTITUDE BY THE CURRENT SUPREME COURT IS INDEED A CHANGE. FOR OVER THIRTY YEARS THE COURT GENERALLY NEGLECTED THE FEDERAL SECURITIES LAWS AND PERMITTED THE CIRCUIT AND DISTRICT COURTS TO CULTIVATE A LARGE AND COMPLEX FIELD OF LITIGATION. AS A RESULT, AN EXPANSIVE DEVELOPMENT OF THE SECURITIES LAWS OCCURRED WITH INFREQUENT BLESSINGS BY EARLIER SUPREME COURTS. EARLIER COURTS USUALLY TOOK CERTIORARI TO ENCOURAGE BROAD REMEDIAL RELIEF FOR PLAINTIFF INVESTORS.

BROAD READINGS BY THE LOWER COURTS OF THE SECURITIES LAWS, ESPECIALLY SECTION 10(B) AND RULE 10B-5 UNDER THE EXCHANGE ACT, EXTENDED THE COVERAGE OF THESE PROVISIONS TO INCLUDE FAR-RANGING, SECURITIES-RELATED CONDUCT. IMPLIED PRIVATE ACTIONS AS WELL AS ACTIONS BROUGHT BY THE SEC WERE PERMITTED WITHOUT A CLEAR STATEMENT OF WHAT THE LIMITATIONS OF THOSE ACTIONS WERE. THE CLASS OF PLAINTIFFS WHO COULD RECOVER UNDER THE SECURITIES LAWS, AS WELL AS THE CLASS OF DEFENDANTS EXPOSED TO LIABILITY WERE GREATLY EXPANDED. SUBSTANTIAL DAMAGES WERE AWARDED AND EXTENSIVE EQUITABLE RELIEF IMPOSED, BUT THE MEASUREMENT OR FORMULATION OF THESE REMEDIES WAS GENERALLY UNCERTAIN.

STARTING IN 1975, HOWEVER, THE BURGER COURT HAS ARTICULATED A MORE LIMITED ROLE FOR THE FEDERAL SECURITIES LAWS IN THE DEVELOPMENT OF GENERAL CORPORATE LAW, BY COMMENCING A STRICTER CONSTRUCTION OF CERTAIN STATUTORY PROVISIONS THAN THE CIRCUIT AND DISTRICT COURTS HAD BEEN USING. THIS SHIFT IN ATTITUDE WAS PARTICULARLY EVIDENT IN CASES INVOLVING IMPLIED RIGHTS OF ACTION. I AM SURE YOU ARE ALL FAMILIAR WITH THE MOST NOTABLE OF THESE CASES:

- 1) IN BLUE CHIP STAMPS V. MANOR DRUGS (421 U.S. 723 1975)) THE COURT HELD THAT ONLY A PURCHASER OR SELLER OF A SECURITY HAS A PRIVATE RIGHT OF ACTION UNDER RULE 10B-5;
- 2) IN CORT V. ASH (422 U. S. 6 (1975)), WHICH WAS NOT A SECURITIES CASE, THE COURT LAID DOWN RESTRICTIONS FOR FINDING AN IMPLIED RIGHT OF ACTION UNDER ANY FEDERAL STATUTE.

- 3) IN ERNST & ERNST V. HOCHFELDER (425 U. S. 185 (1976)) THE COURT HELD THAT SCIENTER IS A NECESSARY ELEMENT FOR ESTABLISHING LIABILITY IN A PRIVATE ACTION FOR DAMAGES UNDER RULE 10B-5.
- 4) IN PIPER V. CHRIS-CRAFT (430 U. S. 1 (1977)) THE COURT DISALLOWED A PRIVATE ACTION FOR DAMAGES UNDER SECTION 14(E) OF THE EXCHANGE ACT ON BEHALF OF A COMPETING TENDER OFFEROR.
- 5) IN SANTA FE V. GREEN (430 U. S. 462 (1977)) A MERE BREACH OF FIDUCIARY DUTY, ABSENT DECEPTION OR MANIPULATION, WAS HELD NOT TO BE A BASIS FOR LIABILITY UNDER RULE 10B-5.

THOSE DECISIONS, AMONG OTHERS, CLEARLY REFLECT A CHANGE OF ATTITUDE BY THE SUPREME COURT FROM THE PHILOSOPHY BEHIND EARLIER PRECEDENTS. (E.G., AFFILIATED UTE CITIZENS V. UNITED STATES 406 U. S. 128 (1972); AND SUPERINTENDENT OF INSURANCE V. BANKERS LIFE & CASUALTY CO., 404 U. S. 6 (1971).) IN EXPRESSING ITS POLICIES IN RECENT OPINIONS, THE COURT STATED ITS AVERSION TO VEXATIOUS LITIGATION, EXPANDED CLASSES OF PLAINTIFFS, UNLIMITED LIABILITY, AND DILUTED PRINCIPLES OF CAUSATION. IT ALSO NOTED THAT THE FEDERAL SECURITIES LAWS SHOULD NOT BE AN ALTERNATIVE TO RESOLVING ISSUES PERHAPS BETTER LEFT FOR STATE LAW OR LEGISLATION.

ALTHOUGH THE COURT MAY HAVE WANTED TO IMPOSE LIMITATIONS ON THE EXPANSION OF THE FEDERAL SECURITIES LAWS, THE COURT SEEMS TO BE MORE CONCERNED WITH THEORIES OF STATUTORY CONSTRUCTION AND FEDERAL PROCEDURE THAN SUBSTANTIVE VIEWS ABOUT THE SECURITIES LAWS.

THE MAJOR RECENT SUPREME COURT DECISIONS I HAVE THUS FAR MENTIONED INVOLVED PRIVATE PARTIES, NOT THE SEC. DURING THE PAST MONTH, HOWEVER, THE COURT SPOKE DIRECTLY TO THE COMMISSION IN SEC. v. SLOAN (No. 76-1607 (MAY 15, 1978)). IT UNANIMOUSLY HELD THAT THE COMMISSION'S PRACTICE OF "TACKING" CONSECUTIVE SUMMARY ORDERS SUSPENDING TRADING IN A PARTICULAR STOCK WAS BEYOND THE SEC'S STATUTORY AUTHORITY. THE COURT HELD THAT THE COMMISSION IS NOT EMPOWERED TO ISSUE, BASED ON A SINGLE SET OF CIRCUMSTANCES, A SERIES OF SUMMARY TRADING SUSPENSIONS BEYOND THE INITIAL TEN-DAY PERIOD PROVIDED IN SECTION 12(K) OF THE EXCHANGE ACT. RATHER, IN ORDER TO DO SO, CIRCUMSTANCES WOULD HAVE TO CHANGE OR NOTICE AND OPPORTUNITY FOR A HEARING WOULD HAVE TO BE PROVIDED. IN SO HOLDING, THE SUPREME COURT STATED THAT IT LOOKS STRICTLY AT ANY SUMMARY POWER OF AN AGENCY WHICH IS NOT CLEARLY SET FORTH BY STATUTE. THE SLOAN DECISION IS A FURTHER INDICATION THAT THE CURRENT COURT IS PREPARED TO ENGAGE IN NARROW STATUTORY CONSTRUCTION, EVEN AT THE EXPENSE OF THE COMMISSION. THE DECISION ALSO REFLECTS THE IMPORTANCE THE COURT PLACES ON LIMITED FEDERAL JURISDICTION.

ALL OF THESE RECENT DECISIONS, WHETHER OR NOT THE SEC WAS A PARTY, RAISE SIGNIFICANT ISSUES FOR THE COMMISSION. FIRST, THE COMMISSION OVER THE YEARS HAS PLACED SUBSTANTIAL RELIANCE UPON PRIVATE LITIGANTS TO ENFORCE COMPLIANCE WITH THE FEDERAL SECURITIES LAWS. AN EARLIER SUPREME COURT SPECIFICALLY RECOGNIZED THAT PRIVATE ACTIONS CAN BE A "NECESSARY SUPPLEMENT" TO SEC LAW ENFORCEMENT EFFORTS (J. I. CASE V. BORAK, 337 U. S. 426 (1964)). THE CURRENT COURT'S LIMITATIONS ON PRIVATE ACTIONS MAY WELL WEAKEN THAT ENFORCEMENT SUPPLEMENT.

SECOND, THESE DECISIONS HAVE ALSO RAISED QUESTIONS OF WHETHER, OR TO WHAT EXTENT, THE SEC SHOULD BE TREATED DIFFERENTLY FROM THE PRIVATE PLAINTIFF. MUST THE SEC PROVE THE SAME ELEMENTS OF A VIOLATION IN ORDER TO OBTAIN AN INJUNCTION OR OTHER EQUITABLE RELIEF AS A PRIVATE PLAINTIFF MUST DO TO OBTAIN DAMAGES? MUST THE SEC MEET THE SAME EVIDENTIARY BURDENS IN ORDER TO OBTAIN THE REQUESTED RELIEF? THE SUPREME COURT SPECIFICALLY NOTED IN SOME OF THESE CASES THAT ITS PARTICULAR HOLDING WAS NOT ADDRESSED TO SEC ACTIONS AND CLEARLY SOME DISTINCTIONS CAN BE DRAWN. THE COMMISSION IS NOT THE ORDINARY LITIGANT TRYING TO VINDICATE PERSONAL RIGHTS; RATHER, IT ACTS AS A STATUTORY GUARDIAN CHARGED WITH SAFEGUARDING THE PUBLIC INTEREST. NONETHELESS,

BECAUSE THE COURT'S RECENT DECISIONS REFLECT A STRICTER CONSTRUCTION OF CERTAIN PROVISIONS THAN PREVIOUSLY APPLIED AND BECAUSE THE BROAD POLICIES ARTICULATED APPEAR TO GO BEYOND ANY INDIVIDUAL CASE, THE ISSUE OF WHETHER THE SEC SHOULD OR WILL BE TREATED DIFFERENTLY IS TROUBLESOME.

FINALLY, QUESTIONS ARE ALSO BEING RAISED AS TO HOW, IF AT ALL, SEC ADMINISTRATIVE PROCEEDINGS ARE AFFECTED BY THESE DECISIONS. ALL OF THESE ISSUES HAVE ALREADY BEEN ADDRESSED TO SOME EXTENT BY CIRCUIT AND DISTRICT COURTS REACTING TO THE SUPREME COURT'S NEW PRONOUNCEMENTS. THEY ARE AT OR NEAR THE CENTER OF THE JUDICIAL DIALOGUE NOW UNDERWAY.

ALTHOUGH ALL LOWER COURTS APPEAR TO HAVE RECOGNIZED A CHANGE OF ATTITUDE BY THE SUPREME COURT, THAT CHANGE IS NOT PERCEIVED AS DRASTIC, OR NECESSARILY REVERSING PRIOR PRECEDENTS FROM A SUBSTANTIVE POINT OF VIEW. THEREFORE, PREVIOUS SIGNIFICANT CIRCUIT CASES ARE BEING RECONCILED WITH THE RECENT SUPREME COURT CASES, RATHER THAN OVERRULED. OF COURSE, THE RESPONSES THUS FAR BY THE LOWER COURTS HAVE BEEN VARIED.

WITH RESPECT TO IMPLIED PRIVATE ACTIONS, SOME LOWER COURTS HAVE GLADLY APPLIED THE CORT AND PIPER REQUIREMENTS AND DISPOSED OF CASES BY FINDING NO IMPLIED PRIVATE ACTION. (E.G., THEOHAROUS V. BACHE & CO., INC. [777 CCH FED. SEC. L. REP. PAR. 96,281 (D. CONN. SEPT., 1977)]).

ON THE OTHER HAND, THE SECOND CIRCUIT, APPLYING THOSE SAME REQUIREMENTS, RECENTLY HAS FOUND NEW PRIVATE ACTIONS UNDER SECTION 17 OF THE EXCHANGE ACT ON BEHALF OF A BROKER'S CUSTOMERS (REDINGTON V. TOUCHE ROSS & CO., _____ F.2D _____, SLIP OP., Nos. 77-7183, 77-7186 (Apr. 21, 1978)), AND UNDER SECTION 206 OF THE INVESTMENT ADVISERS ACT OF 1940 ON BEHALF OF LIMITED PARTNERS OF AN INVESTMENT PARTNERSHIP (ABRAHAMSON V. FLESCHER, 568 F.2d 862 (2d Cir. 1977), CERT. DENIED _____ U. S. _____ (1978)). IT IS NOTEWORTHY THAT THE SUPREME COURT DENIED CERTIORARI WITHIN THE PAST FEW WEEKS IN THE LATTER CASE.

THE LOWER COURT RESPONSES TO SANTA FE V. GREEN HAVE ALSO BEEN MIXED. SOME COURTS HAVE CAREFULLY FOLLOWED THE DICTATES OF THAT DECISION AND FAILED TO FIND A 10B-5 ACTION WHERE THE ALLEGED MISCONDUCT AMOUNTS TO LITTLE MORE THAN A BREACH OF FIDUCIARY DUTY ADEQUATELY ADDRESSED BY STATE LAW. (E.G., COLE V. SCHENLEY, 563 F.2d 35 (2d Cir. 1977)). OTHER COURTS HAVE READ THE "DECEPTION" ELEMENT OF RULE 10B-5 BROADLY TO COVER SIMILAR CONDUCT, REFUSING TO OVERRULE PRIOR LOWER COURT DECISIONS PUT IN DOUBT BY SANTA FE (E.G., GOLDBERG V. MERIDOR, 567 F.2d 209 (2d Cir. 1977)).

LOWER COURT DECISIONS INVOLVING THE HOCHFELDER SCIENTER ISSUE IN PRIVATE ACTIONS HAVE BEEN SOMEWHAT CONSISTENT. THE SECOND CIRCUIT, FOR EXAMPLE, EARLIER THIS YEAR SAID THAT RECKLESS CONDUCT COULD BE A BASIS FOR 10B-5 LIABILITY IN A PRIVATE ACTION, AT LEAST IF THE DEFENDANT IS A FIDUCIARY (ROLF V. BLYTHE EASTMAN DILLON, INC. [77-787] CCH FED. SEC. L. REP. PAR. 96,275 (2D CIR. JAN. 3, 1978)). THE NINTH CIRCUIT LAST MONTH HELD THAT KNOWING OR RECKLESS CONDUCT, AS DISTINGUISHED FROM MERE NEGLIGENCE, IS SUFFICIENT TO SUPPORT LIABILITY UNDER RULE 10B-5 IN ACCORDANCE WITH HOCHFELDER (NELSON V. SERWOLD, [CURRENT] CCH FED. SEC. L. REP. PAR. 96,399 (APR. 3, 1978)). THE MISCONDUCT AMOUNTED TO THE DEFENDANT PURCHASER'S FAILURE TO DISCLOSE HE WAS PART OF A CONTROL GROUP WHICH INTENDED TO MODERNIZE AND ULTIMATELY SELL THE COMPANY.

IN ACTIONS WHERE THE SEC IS THE PLAINTIFF, SOME LOWER COURTS HAVE SAID THAT SCIENTER IS NOT A NECESSARY ELEMENT OF PROOF UNDER RULE 10B-5 (E.G., SEC V. WORLD RADIO MISSION, 554 F.2D 535 (1ST. CIR. 1976)). OTHERS HAVE SAID IT IS (E.G., SEC V. AMERICAN REALTY TRUST, 429 F. SUPP. 1148 (E.D. VA. 1977)). THIS ISSUE IS CURRENTLY BEING LITIGATED IN SOME MANNER IN AT LEAST SEVENTEEN CASES PENDING IN SEVEN OF THE TEN CIRCUIT COURTS, INCLUDING THE NINTH.

THE GENERAL REQUIREMENTS FOR INJUNCTIVE RELIEF REQUESTED BY THE SEC ARE BEING TESTED ANEW BY SOME LOWER COURTS. SPECIFICALLY, PROVISIONS OF THE SECURITIES LAWS GRANTING THE COMMISSION AUTHORITY TO SEEK INJUNCTIVE RELIEF ARE BEING READ WITH THE SUPREME COURT'S NEW ATTITUDE IN MIND. RECENT DECISIONS OF THE SECOND AND NINTH CIRCUIT COURTS OF APPEALS HAVE EMPHASIZED THAT THERE IS NO PER SE RULE REQUIRING THE ISSUANCE OF AN INJUNCTION UPON THE SHOWING OF A PAST VIOLATION. THE LOWER COURTS ARE BEGINNING TO REQUIRE THAT THE SEC MAKE A POSITIVE SHOWING, BEYOND A PAST VIOLATION, THAT THERE IS A REASONABLE LIKELIHOOD THAT A WRONG WILL BE REPEATED. FOR EXAMPLE, IN SEC V. COMMONWEALTH CHEMICAL SECURITIES, INC. (SLIP OP., DOCKET NO. 76-6175 (2D CIR. MAR. 3, 1978)) THE SECOND CIRCUIT ONLY TWO MONTHS AGO STATED:

IT IS FAIR TO SAY THAT THE CURRENT JUDICIAL ATTITUDE TOWARD THE ISSUANCE OF INJUNCTIONS ON THE BASIS OF PAST VIOLATIONS AT THE SEC'S REQUEST HAS BECOME MORE CIRCUMSPECT THAN IN EARLIER DAYS. EXPERIENCE HAS SHOWN THAT AN INJUNCTION, WHILE NOT ALWAYS A "DRASTIC REMEDY" ...OFTEN IS MUCH MORE THAN A "MILD PROPHYLACTIC." ...IN SOME CASES THE COLLATERAL CONSEQUENCES OF AN INJUNCTION CAN BE VERY GRAVE.

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OUR RECENT DECISIONS HAVE EMPHASIZED, PERHAPS MORE THAN OLDER ONES, THE NEED FOR THE SEC TO GO BEYOND THE MERE FACT OF PAST VIOLATIONS AND DEMONSTRATE A REALISTIC LIKELIHOOD OF RECURRENCE.

THE LOWER COURTS HAVE CITED A NUMBER OF FACTORS RELEVANT TO THE DETERMINATION OF WHETHER A REASONABLE LIKELIHOOD OF FUTURE VIOLATIONS EXISTS. THESE FACTORS INCLUDE PAST VIOLATIONS, THE ISOLATED OR RECURRENT NATURE OF THE VIOLATIONS, THE DEGREE OF SCIENTER INVOLVED, AND THE DEFENDANT'S ASSURANCES AGAINST SOME FUTURE VIOLATIONS.

IN SEC. v. BAUSCH & LOMB (565 F.2D 8 (2D CIR. 1977)), THE SECOND CIRCUIT, AFTER FINDING VIOLATIONS OF THE SECURITIES LAWS HAD OCCURRED, AFFIRMED THE DENIAL OF AN INJUNCTION BECAUSE AN ADEQUATE SHOWING OF REASONABLE LIKELIHOOD WAS LACKING. IN SEC. v. KORACORP INDUSTRIES, INC. (CURRENT CCH FED. SEC. L. REP. PAR. 96,370 (FEB. 6, 1978)) THE NINTH CIRCUIT REVIEWED THE SUMMARY JUDGMENT OF A DISTRICT COURT AGAINST THE COMMISSION FOR FAILURE TO SHOW THAT REASONABLE LIKELIHOOD OF FUTURE VIOLATION EXISTED. THE CIRCUIT REVERSED ON PROCEDURAL GROUNDS THE SUMMARY JUDGMENT IN FAVOR OF ALL BUT ONE DEFENDANT -- AN ACCOUNTING FIRM. WITH RESPECT TO THE ACCOUNTING FIRM, THE CIRCUIT AFFIRMED BECAUSE NO FACTUAL ISSUE WAS CONTESTED WITH RESPECT TO THE SUMMARY JUDGMENT MOTION, AND THE COMMISSION FAILED TO SHOW ENOUGH EVIDENCE THAT THE FIRM WOULD AGAIN ENGAGE IN THE ALLEGED MISCONDUCT. IN EVALUATING WHEN INJUNCTIVE RELIEF IS APPROPRIATE, THE CIRCUIT NOTED THE CONTINUING RELEVANCE OF PRIOR HOLDINGS THAT AN INFERENCE ARISES FROM ILLEGAL PAST CONDUCT THAT FUTURE VIOLATIONS MAY OCCUR AND THE FACT THAT ILLEGAL CONDUCT HAS CEASED DOES NOT FORECLOSE INJUNCTIVE RELIEF. HOWEVER,

THE COURT BALANCED THESE VIEWS WITH AN EVALUATION OF "THE CHARACTER OF THE PAST VIOLATIONS AND THE BONA FIDES OF THE EXPRESSED INTENT [BY THE DEFENDANT] TO COMPLY."

EFFORTS TO DISTINGUISH BETWEEN PRIVATE DAMAGE CLAIMS AND SEC INJUNCTIVE ACTIONS MAY BE COMPLICATED BY REQUESTS FOR DISGORGEMENT OR OTHER EQUITABLE RELIEF. IN COMMONWEALTH CHEMICAL WHERE THE SEC REQUESTED AND OBTAINED DISGORGEMENT, THE CIRCUIT NOTED THAT FROM THE DEFENDANT'S STANDPOINT DISGORGEMENT WAS PERHAPS NO DIFFERENT FROM DAMAGES IN A PRIVATE ACTION WHEN THE SEC MAKES THE PROCEEDS AVAILABLE TO INJURED PARTIES. HOWEVER, CLAIMS FOR DISGORGEMENT WOULD USUALLY NOT RESULT IN THE SAME TYPE OF OPEN-ENDED LIABILITY AS IMPLIED DAMAGE CLAIMS. ALSO, AS JUDGE FRIENDLY STATED IN COMMONWEALTH CHEMICAL, THE THEORY SUPPORTING DISGORGEMENT IS QUITE DIFFERENT FROM THAT SUPPORTING AN AWARD OF DAMAGES. I BELIEVE THAT THE QUESTION OF WHAT THEORIES OF LIABILITY APPLY TO CASES WHERE THE SEC REQUESTS EQUITABLE RELIEF IN ADDITION TO AN INJUNCTION MAY NOT BE SO QUICKLY DISMISSED IN ALL FUTURE CASES.

ANOTHER PART OF THE JUDICIAL DIALOGUE INVOLVES SEC ADMINISTRATIVE PROCEEDINGS. LAST YEAR THE DISTRICT OF COLUMBIA CIRCUIT, IN COLLINS SECURITIES CORP, V. SEC (562 F.2D 820 (D.C. CIR. 1977)), REMANDED TO THE COMMISSION AN ORDER REVOKING THE REGISTRATION OF A SECURITIES FIRM AND BARRING ITS PRINCIPAL FROM THE SECURITIES BUSINESS BASED ON VARIOUS VIOLATIONS OF THE ANTI-FRAUD PROVISIONS.

THE CIRCUIT HELD THAT THE COMMISSION HAD ERRED IN BASING ITS DECISION ON THE "PREPONDERANCE OF EVIDENCE" STANDARD OF PROOF BECAUSE IT BELIEVED "CLEAR AND CONVINCING EVIDENCE" IS REQUIRED IN ADMINISTRATIVE PROCEEDINGS INVOLVING CHARGES OF FRAUD, AT LEAST WHERE THE SANCTION IS EXPULSION FROM THE SECURITIES INDUSTRY. FURTHER, THE CIRCUIT COURT ASKED THE COMMISSION TO CONSIDER WHETHER THE HOCHFELDER SCIENTER REQUIREMENT WOULD BE APPLICABLE IN SUCH AN ADMINISTRATIVE PROCEEDING. BECAUSE THE D.C. CIRCUIT HEARS THE GREAT MAJORITY OF APPEALS FROM SEC ORDERS, THE COLLINS DECISION ALONE HAS BEEN THE BASIS FOR A CONTINUING DIALOGUE BETWEEN THE COMMISSION AND THAT CIRCUIT.

THE COLLINS CASE, LIKE MANY OF THE OTHER CASES I HAVE TOUCHED UPON THIS AFTERNOON, TURNED ON PROCEDURE MORE THAN SUBSTANCE. THE SEC IS A REGULATORY AGENCY, NOT A COURT, AND THE COMMISSION HAS VARIED SUBSTANTIVE RESPONSIBILITIES, WHICH CAN BE DISCHARGED IN VARIOUS WAYS, OF WHICH LITIGATION IS ONLY ONE. THE SEC'S PRIMARY MANDATE IS INVESTOR PROTECTION. MANY OF THE CASES WHICH I HAVE DISCUSSED THIS AFTERNOON CAN BE READ AS A LESSENING OF INVESTOR PROTECTION, AT LEAST IN THE SHORT RUN. BUT THE SUPREME COURT IS CONCERNED WITH OTHER IMPORTANT SOCIAL POLICIES, AND SINCE IT IS THE FINAL ARBITER OF CONFLICTING LEGAL VALUES, THE COMMISSION WILL HAVE TO BE CONCERNED WITH THESE POLICIES TOO.

OUR LEGAL SYSTEM PLACES GREAT VALUE ON THE RIGHT OF AN AGGRIEVED INDIVIDUAL TO SEEK REDRESS IN THE COURTS. NEVERTHELESS, LITIGATION IS NOT AN ESPECIALLY DESIRABLE MEANS FOR RESOLVING BASIC DIFFERENCES IN SOCIETAL VALUES. THE LAW HAS ALWAYS STRONGLY ENCOURAGED THE SETTLEMENT OF LITIGATION AND HAS DISCOURAGED BARRATRY AND VEXATIOUS LITIGATION. IN ADDITION, OUR LEGAL SYSTEM HAS ALWAYS ATTEMPTED TO CURB EXCESSIVE OR ARBITRARY GOVERNMENT ACTION, IN ORDER TO PROTECT THE FREEDOM OF THE INDIVIDUAL.

AS A COMMISSIONER, I OFTEN FEEL AMBIVALENT ABOUT PARTICULAR CASES WHICH THE SEC CONSIDERS INSTITUTING OR PARTICIPATING IN AS AMICUS CURIAE. FREQUENTLY, AN INVESTOR HAS BEEN INJURED, THE SECURITIES LAWS HAVE BEEN VIOLATED, AND MY INSTINCTS AS A LAW ENFORCEMENT OFFICIAL ARE TO BRING A CASE, OR ARGUE THE PLAINTIFF'S SIDE. BUT SOMETIMES I WONDER ABOUT THE IMPACT OF SUCH A CASE ON OUR SYSTEMS OF CRIMINAL AND CIVIL JUSTICE, OR THE ORDERLY AND FAIR DEVELOPMENT OF THE SECURITIES LAWS, AND THEN I MAY HAVE SECOND THOUGHTS ABOUT PROSECUTING THE CASE. I THINK OUR SOCIETY IS AFFLICTED BY TOO MUCH LAW. THIS INCLUDES TOO MANY CASES IN THE COURTS. TOO MUCH OF OUR BEST TALENT IS DEVOTED TO LITIGATION. I THINK THAT THE PRESENT SUPREME COURT THINKS SO TOO.

AT THE BEGINNING OF THIS TALK I SAID THAT THE SEC IN ITS ROLE AS A PROSECUTOR MUST SEEK JUSTICE. NOW MEN HAVE BEEN SEEKING JUSTICE FOR THOUSANDS OF YEARS, AND THERE IS STILL GREAT INJUSTICE IN THE WORLD. SO IT WOULD BE UNREASONABLE TO EXPECT A SMALL GOVERNMENT AGENCY WHICH WORRIES PRIMARILY ABOUT THE SECURITIES MARKETS TO FIND THE KEY TO A BETTER JUSTICE SYSTEM IN THE UNITED STATES. NEVERTHELESS, THE COMMISSION DOES DELIBERATE ABOUT MATTERS OF GENERAL POLICY BEFORE IT AUTHORIZES ACTION IN THE COURTS TO A MUCH GREATER EXTENT THAN THE GENERAL BAR MAY UNDERSTAND OR APPRECIATE. THE COMMISSION DOES WORRY ABOUT WHAT MESSAGES THE COURTS ARE COMMUNICATING TO THE AGENCY, AND HOW TO FULFILL THE SEC'S STATUTORY RESPONSIBILITIES IN A MANNER WHICH IS CONSONANT WITH DIRECTIONS FROM THE FEDERAL BENCH.

I KNOW THAT IT IS UNUSUAL FOR A LUNCHEON SPEAKER TO TALK ABOUT COURT CASES, AND THAT IT IS ESPECIALLY UNUSUAL FOR AN SEC COMMISSIONER TO DO SO. I THEREFORE APPRECIATE YOUR PATIENCE AND YOUR INDULGENCE IN LISTENING TO THIS SOMEWHAT HEAVY ADDRESS. BUT WHEN THE SUPREME COURT OF THE UNITED STATES TURNS ITS ATTENTION TO THE SECURITIES LAWS, AND QUESTIONS WHAT POLICIES SHOULD BE BROUGHT TO BEAR ON THE PROSECUTION OF SUCH CASES AT THE SEC AND IN THE FEDERAL COURTS, I BELIEVE THOSE OF US WHO ARE RESPONSIBLE FOR THE INSTITUTION OF SUCH CASES MUST MAKE EVERY EFFORT TO UNDERSTAND THE COURT'S PRONOUNCEMENTS.

THE INTERPRETATIONS I HAVE GIVE TODAY ARE ADMITTEDLY TENTATIVE, PERSONAL AND SUBJECTIVE. TOMORROW'S CASES MAY CAUSE ME TO RECONSIDER MY VIEWS. BUT THE LEGAL PRINCIPLES WHICH THE FEDERAL COURTS ARE DEBATING ARE IMPORTANT AND CERTAINLY WORTHY OF MY STUDY AND YOURS. WHEN WE WONDER ABOUT WHO SHOULD HAVE ACCESS TO THE FEDERAL COURTS, OR WHAT PRINCIPLES OF STATUTORY CONSTRUCTION SHOULD BE USED TO INTERPRET REMEDIAL FEDERAL LEGISLATION, OR HOW LITIGANTS SHOULD BE TREATED BEFORE ADMINISTRATIVE AGENCIES, WE ARE CONSIDERING CONSTITUTIONAL ISSUES OF SIGNIFICANCE TO US ALL, AS LAWYERS AS PUBLIC OFFICIALS, AND AS CITIZENS.